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August 7, 2021

Chief, USDA Forest Service
201 14th Street SW
Washington, D.C. 20250

Secretary, U.S. Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250-0003

Secretary, U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Director, U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, D.C. 20240

RE: 60 Day Notice of Intent to Sue under the Endangered Species Act - Ripley Project on the Kootenai National Forest, Kootenai National Forest Plan Access Amendment, Cabinet-Yaak Recovery Zone BORZ Mapping.

You are hereby notified that Alliance for the Wild Rockies intends to file a citizen suit claim pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g) for violations of the ESA, 16 U.S.C. § 1531 et seq. Alliance will file the claim after the 60 day period has run unless the violations described in this notice are remedied. The name, address, and phone number of the organization giving notice of intent to sue are as follows:

Michael Garrity, Executive Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, Montana 59624
Tel: (406) 459-5936

The name, address, and phone number of counsel for the notifier are as follows:

Rebecca K. Smith, Attorney at Law
Public Interest Defense Center, P.C.
P.O. Box 7584
Missoula, MT 59807
Tel: (406) 531-8133

STATEMENT OF FACTS

On May 17, 2021, Chad Benson, Kootenai National Forest Supervisor, signed a Decision Notice authorizing the Ripley Project on the Libby Ranger District of the Kootenai National Forest in Lincoln County, Montana. The Decision Notice authorizes implementation of the "Modified Proposed Action" set forth in the Project Environmental Assessment (EA).

The Project allows 10,854 acres of commercial logging, including 3,223 acres of clear-cutting. The Project allows the construction of 13 miles of new permanent roads. After the Project, 5.5 miles of these new permanent roads would be blocked with a berm and 6.5 miles of these new permanent roads would be gated to allow administrative use. The Project also authorizes construction of 6 miles of new "temporary" roads, formal addition into the road system of 11 miles of illegal roads, and "maintenance" activities on 93 miles of roads. The record states: "The 93 miles of maintenance would be on currently open roads, gated roads, and barriered or heavily vegetated National Forest System roads." The Forest Plan Biological Assessment states that the definition of temporary road "includes the re-opening of existing bermed or barried road prisms." The agencies do not disclose how many of these 93 miles of roads scheduled for "maintenance" are currently gated, barriered, or impassable with vegetation.

Additionally, although the Forest Service states that it will "store" 23 miles of roads, and "decommission" 2 miles of illegal roads, its plan is simply to "block" the entrance to those roads – i.e. the road bed will still exist on the landscape and all culverts will remain in place. The agency states:

> Roads proposed for decommissioning have all been identified for Level 1 work which, for decommissioning, is defined as "Blocking the entrance and restoring vegetation. Culverts, if existing, remain in place." All roads proposed for decommissioning would have the

entrance blocked to motorized use, including both public and administrative access; refer to Appendix C in the environmental assessment for details. Like for roads proposed for storage, none would be recontoured which would allow for continued non-motorized use.

Furthermore, regarding 4 miles of illegal roads that will be added to the road system, the Forest Service will formally open the area to OHV use, and encourage and facilitate that OHV use by creating a one to two acre gravel parking lot for vehicles and trailers. Finally, 35 miles of "gated and barriered" roads will be opened for public motorized use during the Project.

The Forest Service estimates that the Project will take 25 years to implement. The Forest Service estimates that the Project will result in a $643,000 loss to the federal taxpayer.

The FWS species list states that grizzly bears and lynx may be present on the Kootenai National Forest:

THREATENED, ENDANGERED AND CANDIDATE SPECIES
for the
KOOTENAI NATIONAL FOREST
12/12/2019

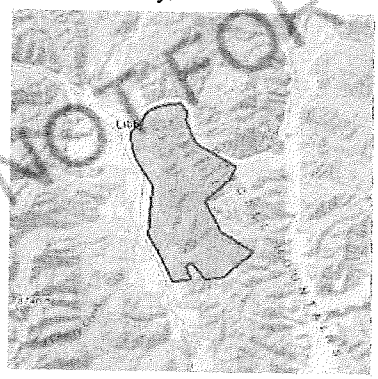
In accordance with section 7(c) of the Act, the Service has determined that the following listed species may be present on the Kootenai National Forest:

COMMON NAME	SCIENTIFIC NAME	STATUS[1]	RANGE – MONTANA
Grizzly Bear	*Ursus arctos horribilis*	Threatened	Resident, transient; Alpine/subalpine coniferous forest; western Montana
Canada Lynx	*Lynx Canadensis*	Threatened; Critical Habitat	Resident; western Montana - montane spruce/fir forests
Bull Trout	*Salvelinus confluentus*	Threatened; Critical Habitat	Clark Fork, Flathead, Kootenai, St Mary, and Belly river basins; Resident in cold water streams, rivers, lakes
White Sturgeon	*Acipenser transmontanus*	Endangered	Bottom dwelling; Kootenai River population
Spalding's Campion	*Silene spaldingii*	Threatened	Open grasslands with rough fescue or bluebunch wheatgrass; upper Flathead and Fisher River drainages
Wolverine	*Gulo gulo luscus*	Proposed	High elevation alpine and boreal forests that are cold and receive enough winter precipitation to reliably maintain deep persistent snow late into the warm season
Whitebark Pine	*Pinus albicaulis*	Candidate	Forested areas in central and western Montana; in high-elevation, upper montane habitat near treeline

The FWS's 2013 Biological Opinion for the Kootenai Forest Plan states: "Because resident lynx may make exploratory or breeding movements into new areas, though typically returning to their original home range, and males in particular may travel long distances during these episodes, the action area is the entire Forest (2,219,100 acres). The FWS's IPAC tool states that lynx and grizzly bears may be present in the Ripley Project area:

Location

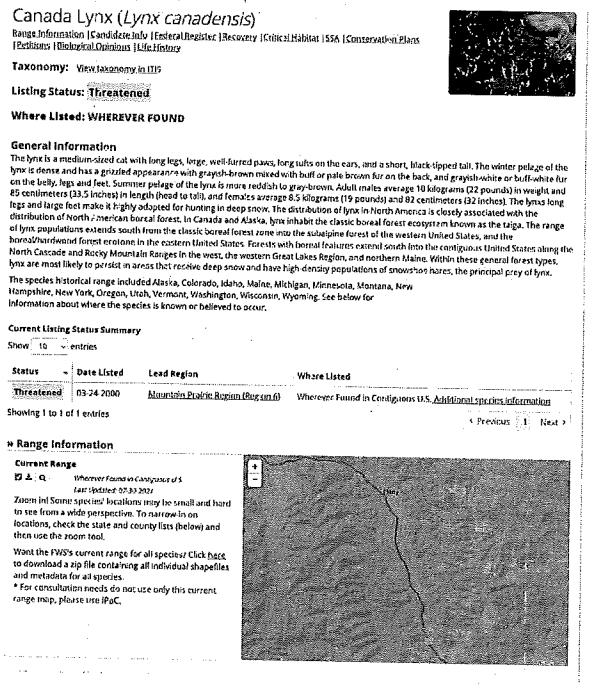
Lincoln County, Montana



Mammals

NAME	STATUS
Canada Lynx Lynx canadensis There is final critical habitat for this species. The location of the critical habitat is not available. https://ecos.fws.gov/ecp/species/3652	Threatened
Grizzly Bear Ursus arctos horribilis There is proposed critical habitat for this species. The location of the critical habitat is not available. https://ecos.fws.gov/ecp/species/7642	Threatened

FWS's website shows the Project area is within "current range" for lynx:



Canada Lynx (*Lynx canadensis*)

Range Information | Candidate Info | Federal Register | Recovery | Critical Habitat | SSA | Conservation Plans | Petitions | Biological Opinions | Life History

Taxonomy: View taxonomy in ITIS

Listing Status: Threatened

Where Listed: WHEREVER FOUND

General Information

The lynx is a medium-sized cat with long legs, large, well-furred paws, long tufts on the ears, and a short, black-tipped tail. The winter pelage of the lynx is dense and has a grizzled appearance with grayish-brown mixed with buff or pale brown fur on the back, and grayish-white or buff-white fur on the belly, legs and feet. Summer pelage of the lynx is more reddish to gray-brown. Adult males average 10 kilograms (22 pounds) in weight and 85 centimeters (33.5 inches) in length (head to tail), and females average 8.5 kilograms (19 pounds) and 82 centimeters (32 inches). The lynxs long legs and large feet make it highly adapted for hunting in deep snow. The distribution of lynx in North America is closely associated with the distribution of North American boreal forest. In Canada and Alaska, lynx inhabit the classic boreal forest ecosystem known as the taiga. The range of lynx populations extends south from the classic boreal forest zone into the subalpine forest of the western United States, and the boreal/hardwood forest ecotone in the eastern United States. Forests with boreal features extend south into the contiguous United States along the North Cascade and Rocky Mountain Ranges in the west, the western Great Lakes Region, and northern Maine. Within these general forest types, lynx are most likely to persist in areas that receive deep snow and have high-density populations of snowshoe hares, the principal prey of lynx.

The species historical range included Alaska, Colorado, Idaho, Maine, Michigan, Minnesota, Montana, New Hampshire, New York, Oregon, Utah, Vermont, Washington, Wisconsin, Wyoming. See below for information about where the species is known or believed to occur.

Current Listing Status Summary

Show 10 entries

Status	Date Listed	Lead Region	Where Listed
Threatened	03-24-2000	Mountain-Prairie Region (Region 6)	Wherever Found in Contiguous U.S. Additional species information

Showing 1 to 1 of 1 entries

« Previous 1 Next »

» Range Information

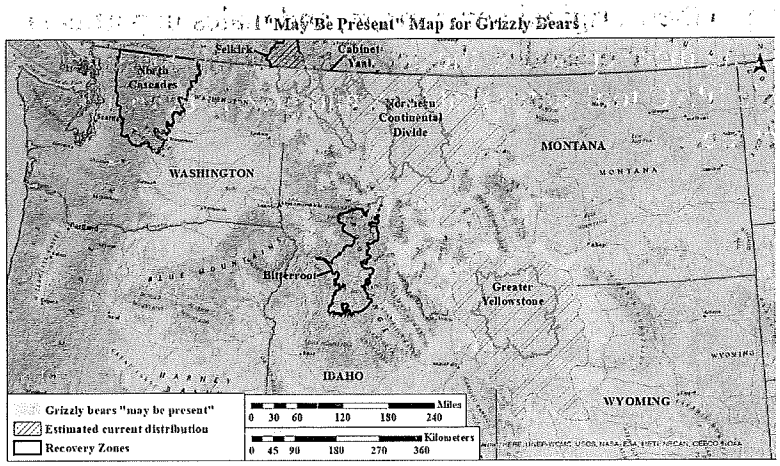
Current Range

Wherever Found in Contiguous U.S.
Last Updated: 07-30-2021

Zoom in! Some species' locations may be small and hard to see from a wide perspective. To narrow in on locations, check the state and county lists (below) and then use the zoom tool.

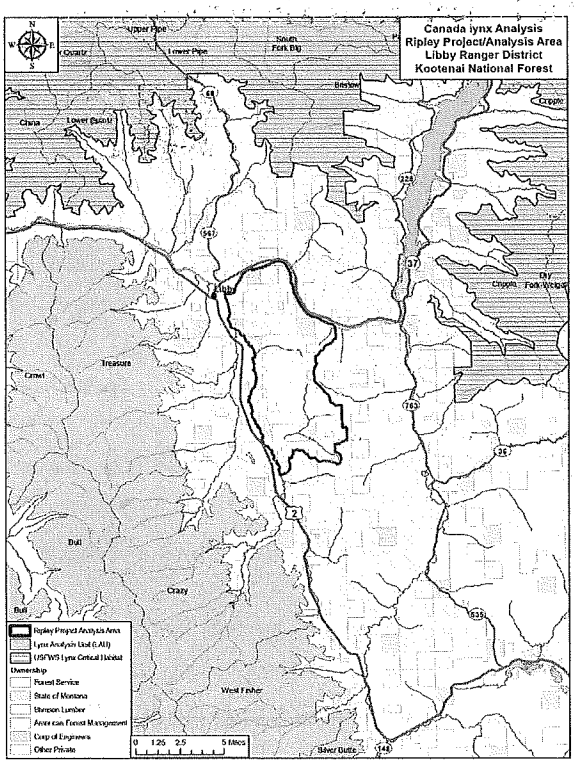
Want the FWS's current range for all species? Click here to download a zip file containing all individual shapefiles and metadata for all species.
* For consultation needs do not use only this current range map, please use IPaC.

FWS's website shows the Project area is an area where grizzlies "may be present:"

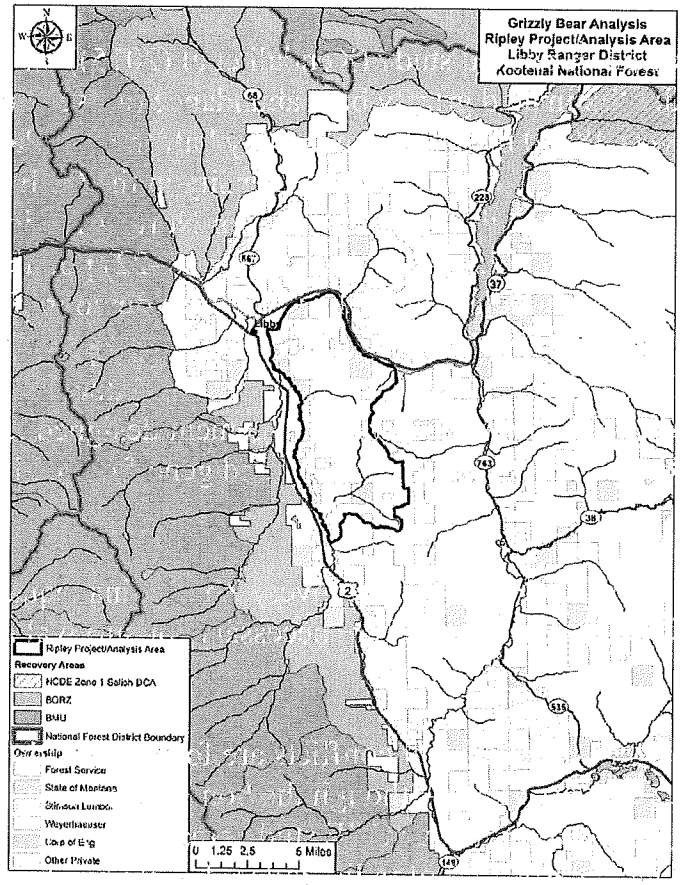


The U.S. Fish and Wildlife Service, in close coordination with state and federal partners, has developed a methodology for the grizzly bear "may be present" map to meet requirements under Section 7(a) of the Endangered Species Act (ESA). "May be present" maps help federal agencies determine where effects to listed species should be considered for consultation from actions they carry out, fund, or permit. As grizzly bears expand their range, maps are intended to be spatially inclusive of all areas that meet the "may be present" methodology for grizzly bears. The "may be present" methodology is derived from current distributions and verified location data outside of current distributions; not all areas that are designated as "may be present" meet the criteria to be included in current distributions. Local evaluation is needed by federal Level 1 ESA Streamlining Teams to determine potential effects of agency actions where grizzly bears "may be present." Identifying locations where grizzly bears "may be present" will facilitate project planning activities that promote grizzly bear conservation and recovery. Last updated January 11, 2021.

There is designated lynx habitat, both critical habitat and "lynx analysis units," near the Project area:



There is designated grizzly habitat, both Cabinet-Yaak Grizzly Bear Recovery Zone "Bear Management Units" and "Bears Outside Recovery Zone" or "BORZ" areas near the Project area:



The Cabinet-Yaak Grizzly Bear is imperiled. The most recent minimum population estimate (published in 2020 for the 2019 monitoring year) for this population is 47 bears, and the Grizzly Bear Recovery Plan requires 100 bears for the minimum viable population. The minimum population estimate published in 2019 for the 2018 monitoring year was 49 individuals, i.e. there was a 20% decline. Another female grizzly was killed in 2020, and therefore the next report (for the 2020 monitoring year) will likely produce an even lower estimate because the loss of females is the most critical factor affecting the trend because of their reproductive contribution to current and future growth. The population is also failing every recovery target: it is failing the target for females with cubs; it is failing the target for distribution of females with cubs; it is failing the female mortality limit (which is 0 mortalities until 100 bears); and it is failing the mortality limit for all bears (also 0 mortalities until 100 bears). From 1982 to 1998, the population increased

with a human-caused mortality rate of 0.71 mortalities per year. From 1999-2006, the population declined with a mortality rate of 2.25 per year. From 2007-2019, the mortality rate was 2.23 per year. With the additional female mortality in 2020, the population could be entering into a decline.

A 2015 peer-reviewed published study (Kendall et al (2015)) on the Cabinet-Yaak grizzly bear found: "Estimated grizzly bear abundance (all sex and age classes) in the CYE in 2012 was 48–50 bears, approximately half the population recovery goal." The study further finds: "Grizzly bear density in the CYE (4.3–4.5 grizzly bears/1,000 km2) was among the lowest of interior North American populations. The sizes of the Cabinet (n = 22–24) and Yaak (n =18–22) populations were similar." Further: "The 2 populations in the CYE were demographically and reproductively isolated from each other and the Cabinet population was highly inbred." Thus, "the small size, isolation, and inbreeding documented by this study demonstrate the need for comprehensive management designed to support CYE population growth and increased connectivity and gene flow with other populations."

Kendall et al (2015) indicates that the Recovery Zone is inadequate, and that expanded protections for BORZ areas are necessary for survival and recovery of this population:

> Measures designed to prevent conflicts are focused inside the 6,765-km2 recovery zone. Although the home range centers of almost all grizzly bears in our CYE study area lay within the recovery zone, nearly 75% of radio-collared bears had home ranges that included areas outside it []. This is, in part, because the CYE recovery area is relatively narrow in relation to the average home range size of grizzly bears. Compared to more compact recovery zones, this configuration places bears at greater risk of coming into contact with people and intentional or accidental killing by humans. Areas bordering protected areas have the greatest influence on population dynamics in small reserves with high perimeter:area ratios and in species that range widely [], characteristics exemplified by the CYE and grizzly bears. An additional challenge to human–bear conflict prevention is the relatively high density of roads and diversity of human activities in the CYE compared with other recovery zones.

More simply put, the Recovery Zone is too narrow for grizzly bear home ranges, and the areas outside the Recovery Zone have such high road densities that bears are at great risk in those areas. The study further finds: "In the small Cabinet and Yaak populations, the difference between growth and decline is 1 or 2 adult females being killed annually or not." T[illegible], the female mortality in 2019 and the additional female mortality in 20[illegible] bode well for this population at this time.

More recently, in January 2021, FWS produced its Species Status Assessment for grizzly bears. The assessment concludes that the Cabinet-Yaak grizzly population has "low" resiliency, which means a low ability for populations to persist in the face of stochastic events, or for populations to recover from years with low reproduction or reduced survival. As noted in Kendall et al (2015), the Cabinet population would likely be extinct without artificial augmentation (i.e. trapping bears from other areas and trucking them into the CYE). The only circumstance under which this population would increase to "high" resiliency would be with a significant increase in conservation measures.

Considering the fact that roads pose the most imminent -- and most controllable – threat to grizzly bears, it is obvious what the most effective measure would be to increase the CYE to high resiliency: application of scientifically-based road density limits across all areas where grizzlies may be present.

The Ripley Project area is two miles from the Cabinet-Yaak Grizzly Recovery Zone, and less than one mile from the Cabinet Face Bears Outside Recovery Zone (BORZ) area. Presently, two grizzly bear males pass through this area in the spring and fall between the Cabinet Mountains and the Fisher River and another male grizzly bear has a home range that overlaps the Ripley Project Area along portions of lower Libby Creek. Thus, the locations of at least three different collared male bears have been recorded within the Ripley project area in the past 5-7 years.

The Project area includes portions of the Cedar Creek-Kootenai River sub-watershed (referred to as a "HUC"), the Mitchell Creek-Kootenai River sub-watershed, the Lower Fisher River sub-watershed, and the Lower Libby Creek sub-watershed. The Cedar Creek-Kootenai River sub-watershed is part of the West Kootenai BORZ.

BORZ areas are designated by the Forest Service and FWS using the following criteria:

Grizzly Bear Data used for Classification

- determination based on evidence of multiple individuals with females + cubs given high priority
- multiple years of use (typically at least 3 observations since 1994)
- radio collar documentation being given a high priority
- additional information such as credible sightings, captures, and mortality sites also taken into consideration

Additional Considerations in Selecting HUCs for inclusion into BORZ

- Proximity to the Recovery Area boundary
- Recurring use in adjacent HUCs
- Suitable habitats
- Importance of identified and potential linkages zones

Potential Exceptions to Inclusion of Entire 6th Order HUC

- Areas that include high concentrations of private lands or recreational residences on FS lands where it has been determined that grizzly bear use should be discouraged
- HUCs that are split by major highways that include little/no observational data or habitat on one side of the highway

The Ripley Project area meets the minimum criteria for a BORZ area because there is evidence of multiple individuals over multiple years, specifically there is evidence of at least three radio-collared male grizzlies with recurring use in the Project area. Additionally, the area meets additional considerations: the area is two miles from the Cabinet-Yaak Grizzly Recovery Zone, and less than one mile from the Cabinet Face Bears Outside Recovery Zone (BORZ) area. There is recurring use in adjacent HUCs.

Multiple HUCs have been designated as BORZ in the past with evidence of use by only three (or fewer) male bears. *See e.g.* Upper South Fork Big Creek, 170101010501; Parsnip Creek, 170101010605; Bristow Creek, 170101010702; Upper Stillwater River-Hollenbaugh Creek, 170102100103; Noxon Reservoir-Stevens Creek, 170102131006; East Fork Elk Creek, 170102131304; Moyie River above Placer Creek, 170101050301; Kalispell, 107102150208; Reeder (Reynolds Cr), 170102150206; Upper W. Branch below Solo Creek, 170102150502; Lower W. Branch above Flat Cr, 17010215070; Pack River above Caribou Creek, 170102140201; Soldier Creek (NFS lands),170102150210.

Nonetheless, on January 15, 2020, the Forest Service and FWS made a determination to deny BORZ designation to the Mitchell Creek-Kootenai River sub-watershed, the Lower Fisher River sub-watershed, and the Lower Libby Creek sub-watershed. This determination may have also occurred in 2021. Thus, the Ripley Project would not receive the grizzly bear protections of the Forest Plan Access Amendment that apply to BORZ areas. No NEPA process or ESA consultation occurred to analyze the effects of denying BORZ protections to the Mitchell Creek-Kootenai River sub-watershed, the Lower Fisher River sub-watershed, and the Lower Libby Creek sub-watershed.

The Project area is checkerboarded with public and private ownership and includes 18,810 acres of National Forest System lands, 215 acres of Corp of Engineer lands, 2,475 acres Montana Department of Natural Resources and Conservation lands, 3,075 acres of Stimson Lumber Company lands, 60 acres of Weyerhaeuser lands, and 4,545 acres of other private lands.

Total road density across the entire Project area is 4.0 mi/sq. mi. Total road density across only National Forest lands is 3.6 mi/sq. mi. Open road density across the entire Project area is 3.1 mi/sq. mi. Open road density across only National Forest lands is 2.2 mi/sq. mi.

Grizzly bears do not calculate road density on a computer; they experience road density as it actually exists on the landscape. Thus, if the purpose of calculating road density is to analyze impacts to grizzly bears, then the calculation must include all roads actually encountered by bears. Otherwise, the analysis depends on the implausible premise that grizzly bears are only impacted by National Forest roads and all other roads on the landscape have no effect on them. There is no scientific support for such a premise. The true landscape experienced by grizzly bears in the Ripley Project area is 4.0 mi/sq. mi of total roads, and 3.1 mi/sq. mi. of open roads.

The Forest Service prepared a biological assessment for grizzly bears for the Project, and received a biological opinion for grizzly bears for the Project from FWS on May 13, 2021. The agencies determined that the Project will likely adversely affect grizzly bears but will not result in jeopardy. The Forest Service did not prepare a biological assessment for lynx for the Project.

In the Project Biological Assessment, the Forest Service represents: "In this analysis, hereafter NCDE analysis, open road densities were compared to values presented in Boulanger and Stenhouse (2014)." The Forest Service then takes the maximum road density tolerated by all bears in that study – 2.4 mi/sq.mi – and asserts that as long as post-Project open road densities on only Forest Service lands remain at 2.4 mi/sq.mi, the Project area would "support grizzly bear presence."

The conclusion of Boulanger and Stenhouse states:

> Conclusions
>
> Previous analyses defined core and recovery zones in Alberta based upon a combination of resource selection function models scores (RSF) and road density thresholds of 0.6 [km/sq.km] and 1.2 [km/sq.km] for core and secondary habitats respectively []. The actual selection of these road density thresholds was based upon earlier studies of habitat selection relative to roads[] and survival analyses (Boulanger and Stenhouse, unpublished data) that identified a linkage between road density and survival. Results from our demographic analysis suggest similar zones. In the context of our analysis, core grizzly bear conservation areas should allow survival rates of females with dependant offspring is high enough to ensure an increasing population. Our demographic model estimates a threshold of at least 0.75 [km/sq.km] or lower when higher vulnerability of females with cubs relative to roads is assumed. If similar survival rates for females and females with cubs are assumed then a road threshold of 1.25 [km/sq.km] is needed to ensure a stable population. We suggest that the 0.75 [km/sq.km] road density threshold is most applicable to ensure viable grizzly bear populations. However we also want to point out that working towards road densities that are lower than this threshold is a preferred conservation strategy and that the influence of human behaviour on roads plays a role in grizzly bear survival rates and population demographics.

Thus, the recommendation of Boulanger and Stenhouse (2014) is that "the 0.75 [km/sq.km] road density threshold is most applicable to ensure viable grizzly bear populations." This translates to 1.2 mi/sq.mi. The Project does not comply with this threshold for grizzly bear viability.

Furthermore, Boulanger and Stenhouse (2014) never state that their study is limited to federal public lands, or to open roads, or to post-project conditions. To the contrary, they expressly state that the study area includes provincial lands. Additionally, the study includes roads "in association with settlements and a legacy of resource extraction industrial activities," and the study "made no attempt to quantify or explore the level of human use on these roads, but rather focused on their presence and abundance on the landscape," and the study looked at "overall road density in areas traversed by bears. . . ."

STATEMENT OF LAW

The ESA mandates: "each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed *may be present* in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be

present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action." 16 U.S.C. § 1536 (c)(1).

In short, "[o]nce an agency is aware that an endangered species *may be present* in the area of its proposed action, the ESA requires it to prepare a biological assessment . . . ." *Thomas v. Peterson,* 753 F. 2d 754, 763 (9th Cir. 1985). The Ninth Circuit holds that "[a] failure to prepare a biological assessment for a project in an area in which it has been determined that an endangered species may be present cannot be considered a de minimis violation of the ESA." *Thomas*, 753 F.3d at 763-764. The "may be present" threshold includes migratory species that may be present "at some point" within the action area, and the standard does not require confirmation that species are "actually known or believed to occur" in the area. 51 Fed. Reg. 19926, 19946 (June 3, 1986).

The requirement for a biological assessment applies to proposed species, such as wolverines, if those proposed species "may be present." As the District of Montana recently held:

> Here, the [] Project falls within the definition of "any agency action." The Forest Service received information from FWS that wolverine "may be present" in the Project area. []. These two facts trigger the Forest Service's obligation to prepare a BA for wolverine.
>
> . . .
>
> The programmatic BA is insufficient to meet the Forest Service's obligation to address the "direct and indirect effects of an action on the species ... together with the effects of other activities that are interrelated or interdependent with that action," 50 C.F.R. § 402.02, because it is too general. The site-specific analysis contained in the EA and Wildlife Report, while tailored to the Project, did not fulfill the agency's consultation obligations because it did not receive FWS concurrence.

Native Ecosystems Council v. Marten, 2020 WL 1479059, at *8 (D. Mont. Mar. 26, 2020).

A plaintiff who alleges a procedural violation under Section 7 of the ESA, as opposed to a substantive violation under Section 9, need not prove that a listed species has in fact been injured. Instead, the plaintiff need only show that the challenged action "may affect" a listed species. "May affect" is a very low threshold and any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement. "While the 'disturbance effects' may be discountable or insignificant. . . 'any possible effect' requires the Forest Service to obtain the concurrence of the Wildlife Service in order to avoid consultation." *Native Ecosystems Council v. Krueger*, 946 F.Supp.2d 1060,1079 (D. Mont.2013). Thus, "the appropriate conclusion when effects on listed species are expected to be discountable, or insignificant, or completely beneficial" is may affect, not likely to adversely affect; "no effect" is not the appropriate conclusion in that circumstance. *Id.*

If the biological assessment concludes that the proposed action "may affect" but will "not adversely affect" a threatened or endangered species, the action agency must consult informally with the appropriate expert agency. 50 C.F.R. §§ 402.14 (b)(1), 402.12(k)(1). If the action "is likely to adversely affect" a listed species, the

action agency must formally consult with the expert agency, and the expert agency must provide the action agency with a Biological Opinion explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(a)-(c); 50 C.F.R. § 402.14. Both the biological assessment and the biological opinion must use "the best scientific and commercial data available." 16 U.S.C. § 1536(c).

LEGAL VIOLATIONS

The Forest Service's failure to prepare a Biological Assessment for lynx for the Project violates the ESA. The standard for a Biological Assessment is "may be present." The species list, Forest Plan consultation, FWS current range, FWS IPAC, and the fact that the designated Lynx Analysis Units and lynx critical habitat are in proximity to the Project area all indicate that lynx "may be present" at some point in the action area during the 25 years of Project implementation -- even if just traveling through from one human-designated habitat block to another. The legal inquiry is whether a lynx may pass through any part of the Project area at any point during the 25 years of Project implementation. The Forest Service did not apply the legal standard for the "may be present" threshold, but instead refused to prepare a Biological Assessment because it decided not to designate a "Lynx Analysis Unit" in the Project area. This violates the ESA.

The agencies' ESA consultations for grizzly bears for the Project and/or Forest Plan area arbitrary and capricious and violates the ESA. The exclusion of non-open, non-Forest Service roads in the road density calculations and corresponding effects analysis has no scientific basis, is not the best available science, and is arbitrary and capricious because it does not accurately reflect the way the grizzly bear experiences the landscape and is affected by it. At a bare minimum, the true road density (both open and total roads) on the landscape – as experienced by grizzly bears – should have been included in the cumulative effects analysis, which includes state and private actions. A biological assessment must include "[a]n analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies." 50 C.F.R. § 402.12(f)(4). "Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. §402.02. Once the true road densities are disclosed, it is those densities that must be compared to scientific literature to analyze effects to grizzly bears. By relying on a fictional road density that grizzly bears do not experience, and

comparing that fiction to scientific literature (which was also done incorrectly), the agencies have acted in an arbitrary and capricious manner.

In addition to providing incorrect road density calculations, the agencies also failed to apply the best available science. The Forest Service relies on Boulanger and Stenhouse (2014) but argues that 2.4 mi/sq.mi is an appropriate threshold for roads. In reality that is the maximum number of roads tolerated by any bears in the study. If the goal is a viable population – the threshold is 1.2 mi/sq.mi maximum. There was no serious discussion of this fact. Once actual total road density in the Project area – 4.0 mi/sq.mi. – is compared to the scientific threshold – 1.2 mi/sq.mi – it becomes clear why no reproducing female bears can be found in this area even though the entire western U.S. used to be occupied by grizzlies. If the agencies were truly committed to recovery of this population, they would reduce road density in this Project area to 1.2 mi/sq.mi., or in the very least have an honest, meaningful, scientifically-based discussion about the connection between road density and viability and recovery. In particular, the discussion of the road density threshold for breeding females is necessary in order to have any meaningful discussion as to whether this Project or Forest Plan is jeopardizing the survival and recovery of this population by significantly impairing breeding, particularly when the population has a "low" resiliency. There is also no serious discussion of whether this Project or Forest Plan is jeopardizing the survival and recovery of this population by reducing distribution, particularly when the road densities in this Project area and in all BORZ areas is likely to displace grizzly bears. The agencies' failure to provide any scientifically-based road limit for BORZ areas or areas outside BORZ areas to address these serious concerns with reproduction and distribution is arbitrary and capricious.

Another problem with the Project and/or Forest Plan consultation is the failure to provide an accurate analysis of road density during and after the Project. The "during Project" calculation does not include 19 miles of newly constructed roads, 11 miles of illegal roads, or the bermed/gated/barriered roads that will be reopened for the Project under the "road maintenance on 93 miles" category. Moreover, the agencies do not even disclose how many of the 93 miles of "maintenance" roads are roads that will be re-opened for the Project from bermed/gated/barriered status. This is significant because the Forest Plan consultation states that re-opening bermed/gated/barriered roads must be analyzed as creating "temporary" roads. Because the Project will last for 25 years, there must be an accurate assessment of how many roads will be receiving motorized use during those 25 years in order to have a meaningful analysis of how this Project may affect grizzly bears over the next 25 years.

Another problem with the Project and/or Forest Plan consultation is the failure of the agencies to address the link between the "temporary roads" of the present and the "undetermined roads" of the future; they are one and the same. When the Forest Service puts a dirt berm in front of a road and then removes the road from its computer database – but leaves the roadbed intact and culverts in place –it is only a matter of time before "illegal" motorized use will occur on the road. However, it is not until the next project that comes around that the Forest Service recognizes these roads again – this time as "undetermined" roads. As in this project, the agency then often just adds them back into the system – here 11 miles of undetermined roads will be added – but argues that no effects are occurring since they are already on the ground. The problem here is that the agency analyzed the berming of those roads as "decommissioning" and counted it as a net positive effect at the time. Thus, when the agency adds the roads back in, it must be analyzed as a net negative effect. In the very least, there must be an honest analysis of this cycle of "temporary" roads not actually having "temporary" effects when the roads are not fully recontoured because the roads receive illegal motorized use after the project, and then -- in a reasonably foreseeable process -- get added back into the system as part of the next project or decision in the area. Here, the agencies must address the possibility that 11 miles of undetermined roads were "temporary roads" from the past. The agencies must also address the fact that it is reasonably foreseeable that the 19 miles of new roads constructed for this Project will become undetermined roads in the future. The agencies must disclose the true effectiveness or ineffectiveness of road closure methods such as berms and gates and other barriers, with a full disclosure of actual monitoring results.

Another problem with the Project and/or Forest Plan consultation is the agencies' failure to fully disclose the population and (non)recovery status of the Cabinet-Yaak grizzly bear population. As recited at length above, the status is dire, but this was not fully disclosed and analyzed in the context of this Project or the Forest Plan. Instead, the agencies imply that the population is doing well and that if it was not, that would have nothing to do with the Forest Service. It is this type of attitude that has failed to recover the Cabinet-Yaak grizzly population after 45 years of federal management under the ESA and after almost 30 years of management under the 1993 Recovery Plan

In summary, the agencies' BA, BiOp, and no jeopardy/incidental take statement conclusions for the Project and/or Forest Plan for grizzly bears violate the ESA and fail to use the best available science and are arbitrary and capricious.

Finally, the agencies' decision not to designate any of the three sub-watersheds in the Ripley Project area as a BORZ area, or include them in the Cabinet Face or other BORZ area, is an "agency action" under the ESA that requires ESA consultation because it determines which areas will receive grizzly bear protections under the Access Amendment. This challenge is not limited to the Project, but rather applies to all of the "no" determinations that the agencies make at the programmatic level each year at their annual decision-making meeting. This decision occurred in January 2020 and may have occurred in 2021 as well. Each time they make a "no" decision for a sub-watershed, the agencies are withholding necessary protections from the Access Amendment that would aid in recovery of the Cabinet-Yaak grizzly bear. For example, if the agencies had made a "yes" determination for the watersheds in the Ripley Project area, all temporary Project roads would require effective gates during the 25-year-long Project, the net increase in total roads would be prohibited, and the net increase in open roads would be prohibited. Without these protections, the Project area is likely to experience a road density that is so high that it will exclude grizzly bears for the next 25 years, thus resulting in a self-fulfilling prophecy that it may never again have enough evidence of recurring grizzly use to receive a BORZ designation and contribute to the survival and recovery of this imperiled, tiny grizzly population. Nothing in the record demonstrates that FWS ever made a decision concerning whether the BORZ "no" determinations would jeopardize the Cabinet-Yaak grizzly bear population. The failure to assess whether the BORZ "no" determinations would jeopardize the Cabinet-Yaak grizzly bear population violated the ESA. Alternatively, or in addition, the agencies' refusal to analyze whether the BORZ programmatic "no" determinations would jeopardize the Cabinet-Yaak grizzly bear population as part of this Project-level consultation violates the ESA and is arbitrary and capricious.

CONCLUSION

If the violations of law described above are not cured within 60 days, the Alliance intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

/s/ Rebecca K.Smith

Rebecca K. Smith, Counsel for Notifier

CC:

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